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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 772

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, a Maryland corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER

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National Labor Relations Act, as amended, 61 Stat. 136 (1947), 29 U.S.C. § 151, *et seq.*:	
§ 8(a)(5), 29 U.S.C. § 158(a)(5)	3, 4
§ 9(b)(1), 29 U.S.C. § 159(b)(1)	2, 3, 4

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Preliminary Statement

The opinions below, the statement of the grounds on which the jurisdiction of this Court is invoked, the questions presented for review, the statutory provisions which the case involves, and the statement of the case are set forth in full in the Petition for Writ of Certiorari filed by petitioner herein.

Argument

1. In its Brief in Opposition filed herein, the National Labor Relations Board asserts that the circumstances of the case at bar are "unique" and that the case therefore involves a "narrow question" and presents "no issue of continuing importance warranting review by this Court."

This assertion is directly contradicted, and the critical importance of the case at bar is underscored, by the Board's use of this case in *A. O. Smith Corp.*, 166 N.L.R.B. No. 98, 1967 CCH NLRB ¶ 21,666 (1967), to permit the addition, to an existing mixed professional-nonprofessional unit, of new categories of nonprofessional employees, even though the professional employees in the unit have never been accorded an opportunity for a self-determination election under Section 9(b)(1) of the Act.

The Board arrived at this conclusion, moreover, in the face of its prior decision in *Lockheed Aircraft Corporation*, 155 N.L.R.B. 702 (1965), where it held that Section 9(b)(1) precludes it from permitting a union to add professional employees to a mixed unit (by way of a petition for clarification of the unit) on the express ground that "Section 9(b)(1) precludes the Board's granting the relief sought," because the existing unit, although "certified before the passage of Section 9(b)(1) in 1947, includes both professional and non-professional employees," and "was established without a separate ballot among the professionals" (155 N.L.R.B. at 713). This holding has been reaffirmed by the Board as recently as November 15, 1967, in *Gibbs & Cox, Inc.*, 168 N.L.R.B. No. 42, 1968-1 CCH NLRB ¶ 21,911 (1967).

The Board's decision in the *Lockheed* case is of particular significance inasmuch as the Board expressly rejected therein any distinction between "certified" and "consensual" units, noting that "for clarification purposes the Board does not now distinguish between Board-created units and those arising solely by contract" (155 N.L.R.B. at 713 n. 16). For this proposition, the Board cited its prior decision in *Brotherhood of Locomotive Firemen & Enginemen*, 145 N.L.R.B. 1521 (1964), in which the Board, reversing its own prior decision in *The Bell Telephone Company of Pennsylvania*, 118 N.L.R.B. 371 (1957), expressly held that it had authority to make additions to uncertified as well as certified units.

The net result is a crazy-quilt of distinctions superimposed upon distinctions: The Board recognizes in Section 8(a) (5) proceedings a distinction between "certified" and "consensual" units which it does not recognize in clarification proceedings to add to existing bargaining units; and a union, though barred from adding new categories of professional employees, will be permitted to add an unlimited number of nonprofessional employees to a mixed unit in which the professional employees have never been accorded an opportunity for self-determination under Section 9(b)(1).

The Board's use of the case at bar as authority for the last-cited proposition in the *A. O. Smith* case, *supra,* is squarely inconsistent with the Congressional intention underlying Section 9(b)(1) and with the rationale of this Court's decision in *Leedom* v. *Kyne,* 358 U.S. 184 (1958). To add non-professional employees to an already mixed unit will inevitably result in a dilution of the position of the professional employees in the unit *vis-a-vis* the non-professionals, with the result that professional employees who may previously have predominated in a mixed unit created—whether by certification or bargaining—without their having been afforded an opportunity for self-determination, could suddenly find themselves in a distinct minority within the mixed unit and effectively locked into it, unable to secure the self-determination Congress intended they should have.[1]

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[1] Despite the Board's constant assurances herein that "at an appropriate time" the professional employees would have an opportunity to seek to decertify the Union, it is to be noted that the Board has never granted professional employees the right to maintain decertification proceedings except in the overall mixed unit, which would require a showing of the support of 30% of the membership of the overall mixed unit merely to have the Board entertain a decertification petition. *Westinghouse Electric Corporation,* 129 N.L.R.B. 846 (1960). In fact, the Regional Director dismissed the decertification petition filed by the professional employees herein on that very ground.

The fact that this result would be achieved by the Board on the strength of the decisions below demonstrates persuasively the critical importance of the issues presented in the case at bar. If the decision below is permitted to stand, the result must inevitably be the erosion of Section 9(b)(1) and of this Court's decision in *Leedom v. Kyne*.

2. In its Brief in Opposition herein, the Board erroneously characterizes petitioner's second argument as a contention by petitioner that it had a good-faith doubt as to Local 400's majority status, from which the Board concludes that the argument "presents only an evidentiary issue which does not warrant review by this Court." The same characterization is found in the Union's Brief in Opposition.

In fact, petitioner's contention was and is that the Board failed to present *any* evidence that Local 400 at any time represented a majority of the employees in the mixed unit. The fact that the vast majority of the professional employees in the mixed unit—although just short of a majority of the overall unit—had abandoned the strike prior to petitioner's withdrawal of recognition certainly does not stand as either a concession or proof of majority status. *Norlee Togs, Inc.*, 129 N.L.R.B. 14 (1960); *United Transports, Inc.*, 123 N.L.R.B. 668, 680 (1959); *McGough Bakeries Corp.*, 58 N.L.R.B. 849, 853 (1944), modified as to another point and enforced, 153 F. 2d 420 (5th Cir. 1946).

Since the Board cannot and admittedly does not rely upon the illegal and void 1951 certification as a source of any presumption of majority status, this is simply a case of the clear-cut failure on the part of the Board to meet its burden of proving majority status, which is an indispensable requirement of a finding of an unlawful refusal to bargain in violation of Section 8(a)(5) of the Act. The mere fact that petitioner and Local 400 entered

into intervening collective bargaining agreements does not fill this void. *Cf. International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 71 (1961).

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for a Writ of Certiorari herein, said Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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